

1 ERIC DONEY, #76260
edoney@donahue.com
2 JULIE E. HOFER, #152185
jhofer@donahue.com
3 ANDREW S. MACKAY, #197074
amackay@donahue.com
4 DONAHUE FITZGERALD LLP
Attorneys at Law
5 Oakland, California 94612-3520
Telephone: (510) 451-3300
6 Facsimile: (510) 451-1527
7 Attorneys for Plaintiffs
ADOBE SYSTEMS INCORPORATED,
8 AUTODESK, INC., and COREL
CORPORATION

SEONG H. KIM, # 166604
skim@steptoe.com
JAMES C. WALD, # 229108
jwald@steptoe.com
STEPTOE & JOHNSON LLP
2121 Avenue of the Stars
Los Angeles, CA 90067
Telephone: (310) 734-3200
Facsimile (310) 734-3300

DAVID H. KWASNIEWSKI, #281985
dkwasniewski@steptoe.com
STEPTOE & JOHNSON LLP
1001 Page Mill Road
Building 4, Suite 150
Palo Alto, CA 94304
Telephone: (650) 687-9500
Facsimile: (650) 687-9499

Attorneys for Defendants
FOREVER 21, INC. and FOREVER 21
RETAIL, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

15 ADOBE SYSTEMS INCORPORATED, a
16 Delaware corporation, AUTODESK, INC.,
a Delaware corporation and COREL
17 CORPORATION, a Canadian corporation,

18 Plaintiffs,

19 v.

20 FOREVER 21, INC., a Delaware
corporation, and FOREVER 21 RETAIL,
21 INC., a California corporation,

22 Defendants.

Case No. 3:15-cv-00404-WHA

**JOINT CASE MANAGEMENT
CONFERENCE AND RULE 26(f)
STATEMENT**

CMC Date: April 30, 2015
Time: 11:00 a.m.
Location: Courtroom 8, 19th Floor
Judge: Hon. William H. Alsup

The parties to the above-entitled action jointly submit this JOINT CASE MANAGEMENT STATEMENT & PROPOSED ORDER pursuant to the Standing Order for All Judges of the Northern District of California dated July 1, 2011 and Civil Local Rule 16-9.

1. Jurisdiction & Service

The basis for the court's subject matter jurisdiction over plaintiff's claims and defendant's counterclaims, whether any issues exist regarding personal jurisdiction or venue, whether any parties remain to be served, and, if any parties remain to be served, a proposed deadline for service.

Jurisdiction over Defendant Forever 21, Inc. and Defendant Forever 21 Retail, Inc. (collectively, "Forever 21") exists pursuant to 17 U.S.C. § 501, et seq. (copyright), 28 U.S.C. § 1331 (federal subject matter jurisdiction) and 28 U.S.C. § 1338 (copyright actions). Jurisdiction exists because Forever 21 are residents of California.

No issues exist regarding personal jurisdiction or venue.

2. Facts

A brief chronology of the facts and a statement of the principal factual issues in dispute.

Plaintiffs Adobe Systems Incorporated, Autodesk, Inc., and Corel Corporation (collectively, "Plaintiffs") develop and license software products. Individuals and businesses license Plaintiffs' software for a variety of uses.

Forever 21 operates retail stores nationally and internationally. Forever 21 has installed and copied some of Plaintiffs' software onto some of Forever 21's computers.

Plaintiffs' Position On Disputed Facts:

Forever 21's installation and copying of Plaintiffs software products was without adequate licenses. Although Forever 21 had purchased licenses for some of Plaintiffs' software products, Forever 21 installed Plaintiffs' software products on more computers than were permitted by the licenses at issue, and installed other software products despite having no licenses at all. These unauthorized installations occurred with Forever 21's knowledge and conferred economic benefits on Forever 21. To install some of the unlicensed copies, Forever 21 used unauthorized codes or hacking software. Forever 21 willfully sought to conceal their infringement from

1 Plaintiffs.

2 Forever 21's Position On Disputed Facts:

3 Forever 21 had adequate licenses to install and copy Plaintiffs' software products on its
4 computers. For several of Plaintiffs' software products, Forever 21 had extra licenses. Any
5 unauthorized installations (which Forever 21 denies) occurred without Forever 21's knowledge,
6 conferred no economic benefits on Forever 21, were de minimis, unintentional, and caused no
7 actual damages to the Plaintiffs. In addition, Forever 21 denies that it used any "unauthorized
8 codes" or "hacking software." to install unauthorized versions of Plaintiffs' software on Forever
9 21's computers. Regardless, Forever 21 believes that many of the Plaintiffs' copyrights are no
10 longer valid and enforceable.

11 **3. Legal Issues**

12 *A brief statement, without extended legal argument, of the disputed points of law,*
13 *including reference to specific statutes and decisions.*

14 Plaintiffs' Legal Issues: There is a legal issue whether Forever 21 infringed Plaintiffs'
15 copyrights pursuant to 17 U.S.C. § 106 by making unlicensed copies of Plaintiffs' software
16 products onto Forever 21's computer hardware. There is an issue of the amount of damages
17 appropriate under 17 U.S.C. § 504. There is an issue of whether preliminary and/or permanent
18 injunctive relief against Forever 21 is appropriate under 17 U.S.C. § 502. There is a legal issue
19 whether Forever 21 used anti-circumvention technology to access Plaintiffs' software, in violation
20 of 17 U.S.C. § 1201 *et seq.* There is an issue whether Plaintiffs are entitled to their attorneys' fees
21 under 17 U.S.C. § 505.

22 Forever 21's Legal Issues: In addition to those listed above, the following legal issues are
23 in dispute: (a) whether Plaintiffs' copyrights are valid and enforceable; (b) whether elements of
24 Plaintiffs' software are functional, not original, or otherwise unprotectable; (c) whether the
25 express or implied license agreements between the parties rendered Forever 21's alleged use of
26 the copyrighted works permissible; (d) whether Plaintiffs' have misused their copyrights so as to
27 render them unenforceable; (e) whether Forever's 21's use of the copyrighted works constitutes
28 "fair use"; (f) whether the alleged infringement caused the Plaintiffs to suffer any actual damages;

(g) whether the alleged copying was de minimis; (h) whether Plaintiffs' practice of selling the copyrighted products in large bundles renders those bundles a single "work" within the meaning of 17 U.S.C. § 504(c); (i) whether the alleged infringement was committed by third parties without the knowledge of Forever 21; (j) whether the alleged circumvention of copyright protection measures was innocent; and (k) whether the Plaintiffs come to the Court with unclean hands due to their practice of paying unidentified third parties to "inform" on alleged infringers and then demanding exorbitant license fees to avoid a lawsuit; and (l) whether Forever 21 is entitled to its reasonable attorneys' fees in the event it prevails under 17 U.S.C. § 505.

4. Motions

All prior and pending motions, their current status, and any anticipated motions.

No motions are currently pending. Plaintiffs may file a motion for summary judgment. Forever 21 may file a motion for summary judgment.

5. Amendment of Pleadings

The extent to which parties, claims, or defenses are expected to be added or dismissed and a proposed deadline for amending the pleadings.

The parties currently do not anticipate any amendments of the pleadings. The parties propose March 18, 2016 as the deadline for the parties to file any motion or stipulation seeking amendment of the pleadings.

6. Evidence Preservation

A brief report certifying that the parties have reviewed the Guidelines Relating to the Discovery of Electronically Stored Information ("ESI Guidelines"), and confirming that the parties have met and conferred pursuant to Fed. R. Civ. P. 26(f) regarding reasonable and proportionate steps taken to preserve evidence relevant to the issues reasonably evident in this action. See ESI Guidelines 2.01 and 2.02, and Checklist for ESI Meet and Confer.

Plaintiffs have instructed Forever 21 to preserve evidence. Plaintiffs and Forever 21 believe that they have taken reasonable and appropriate steps to preserve evidence relevant to the issues reasonably evident in this action.

1 **7. Disclosures**

2 *Whether there has been full and timely compliance with the initial disclosure*
 3 *requirements of Fed. R. Civ. P. 26 and a description of the disclosures made.*

4 Plaintiffs and Forever 21 have agreed to exchange initial disclosures before May 29, 2015.

5 **8. Discovery**

6 *Discovery taken to date, if any, the scope of anticipated discovery, any proposed*
 7 *limitations or modifications of the discovery rules, a brief report on whether the parties have*
 8 *considered entering into a stipulated e-discovery order, a proposed discovery plan pursuant to*
 9 *Fed. R. Civ. P. 26(f), and any identified discovery disputes.*

10 Plaintiffs have served interrogatories and requests for production of documents on Forever
 11 21. Forever 21 plan on serving Plaintiffs with interrogatories and the request for production of
 12 documents.

13 Forever 21 believes that extensive written and deposition discovery is not appropriate in
 14 this case and unlikely to resolve the key factual disputes which concern Plaintiffs' marketing and
 15 sale of their software to Forever 21, and Forever 21's use of that software. Forever 21 thus
 16 proposes a reasonable limit of 25 interrogatories per side and that each side be limited to ten Rule
 17 30(b)(6) depositions.

18 Plaintiffs respond that the interrogatories they have served collectively exceed the limit
 19 proposed by Forever 21, but are within the limits required by Federal Rule of Civil Procedure
 20 33(a)(1). Plaintiffs maintain that the limit on interrogatories requested by Forever 21 is
 21 unwarranted, given the size of Forever 21, the potential scope of Forever 21's infringement and
 22 the number of copyrighted works at issue. Plaintiffs' propose that the number of Rule 30(b)(6)
 23 depositions be governed by Federal Rule of Civil Procedure 30 with no additional restrictions.
 24 This also allows the parties to seek leave of the Court if additional depositions are necessary.

25 **9. Class Actions**

26 *If a class action, a proposal for how and when the class will be certified.*

27 Not applicable.

1 **10. Related Cases**

2 *Any related cases or proceedings pending before another judge of this court, or before*
 3 *another court or administrative body.*

4 None.

5 **11. Relief**

6 *All relief sought through complaint or counterclaim, including the amount of any*
 7 *damages sought and a description of the bases on which damages are calculated. In addition, any*
 8 *party from whom damages are sought must describe the bases on which it contends damages*
 9 *should be calculated if liability is established.*

10 Plaintiffs have not yet decided whether to seek relief in the form of actual damages plus
 11 the profits of Forever 21 related to the infringement, or statutory damages. If Plaintiffs elect
 12 actual damages, the amount of damages will be based upon Plaintiffs' lost profits or Forever 21's
 13 unjust enrichment as a result of Forever 21's infringement. If Plaintiffs elect statutory damages, it
 14 will be for Forever 21's knowing, intentional and malicious infringement of Plaintiffs' copyrights.
 15 In either event, the amount of Plaintiffs' damages will be determined in an appropriate amount
 16 based upon information obtained in discovery and through other sources.

17 Plaintiffs also seek a preliminary injunction and a permanent injunction preventing further
 18 infringing use of Plaintiffs' copyrights and illegal use of anti-circumvention technology to access
 19 Plaintiffs' copyrighted software.

20 Forever 21 does not concede liability for any claimed infringement in this case. However,
 21 were such liability established, Forever 21 agrees that that Copyright Act provides for actual
 22 damages or statutory damages. Forever 21 contend that the proper measure for either form of
 23 damages in this case is zero.

24 Forever 21 seeks a judgment finding no infringement and that Plaintiffs' asserted
 25 copyrights are invalid and unenforceable, and further awarding Forever 21 its reasonable costs
 26 and attorneys' fees.

27 **12. Settlement and ADR**

28 *Prospects for settlement, ADR efforts to date, and a specific ADR plan for the case,*

1 *including compliance with ADR L.R. 3-5 and a description of key discovery or motions necessary*
 2 *to position the parties to negotiate a resolution.*

3 Plaintiffs and Forever 21 stipulate to private mediation. The parties recognize that certain
 4 stages of discovery in this case may be unusually expensive and burdensome. Given the
 5 possibility of avoiding this burden, the parties stipulate to an early mediation—within 90 days.
 6 The parties may seek further private mediation session should the matter not settle pursuant to the
 7 first mediation session.

8 **13. Consent to Magistrate Judge For All Purposes**

9 *Whether all parties will consent to have a magistrate judge conduct all further*
 10 *proceedings including trial and entry of judgment.*

11 ☐ YES ☒ NO

12 **14. Other References**

13 *Whether the case is suitable for reference to binding arbitration, a special master, or the*
 14 *Judicial Panel on Multidistrict Litigation.*

15 Not Applicable.

16 **15. Narrowing of Issues**

17 *Issues that can be narrowed by agreement or by motion, suggestions to expedite the*
 18 *presentation of evidence at trial (e.g., through summaries or stipulated facts), and any request to*
 19 *bifurcate issues, claims, or defenses.*

20 None at this time.

21 **16. Expedited Trial Procedure**

22 *Whether this is the type of case that can be handled under the Expedited Trial Procedure*
 23 *of General Order 64, Attachment A. If all parties agree, they shall instead of this Statement, file*
 24 *an executed Agreement for Expedited Trial and a Joint Expedited Case Management Statement,*
 25 *in accordance with General Order No. 64, Attachments B and D.*

26 Not Applicable.

27 **17. Scheduling**

28 *Proposed dates for designation of experts, discovery cutoff, hearing of dispositive*

1 *motions, pretrial conference and trial.*

2 The parties agree that discovery in this case will be expensive and time-consuming, and
 3 depending on the schedule set by the Court have agreed to postpone the most onerous portions of
 4 discovery until completion of a private mediation to occur within 90 days because it may have a
 5 detrimental impact on the ability of the parties to resolve this matter on their own. Accordingly,
 6 the Parties propose the following schedule:

8 Event	Proposed Date
9 Deadline to file motion or stipulation seeking 10 amendment of pleadings	March 18, 2016
11 Fact Discovery Cut-off (all discovery responses 12 must be due and served by this date)	April 15, 2016
13 Last day for hearing on fact (non-expert) 14 discovery motions	June 17, 2016
15 Initial Expert Disclosures	April 1, 2016
16 Rebuttal Expert Disclosures	April 29, 2016
17 Expert Discovery Cut-off	June 17, 2016
18 Last day for hearing on expert discovery motions	August 4, 2016
19 Last day for hearing on non-discovery motions, 20 including summary judgment or other dispositive 21 motions	July 21, 2016
22 Motions <i>in limine</i> filing deadline (hearing on 23 motions to be held at Final Pretrial Conference 24 or sooner)	August 24, 2016
25 Final Pretrial Conference	Wednesday, August 31, 2016 at 2:00 p.m.
26 Trial	September 26, 2016

18. Trial

Whether the case will be tried to a jury or to the court and the expected length of the trial.

The parties expect a two-week jury trial.

19. Disclosure of Non-party Interested Entities or Persons

Whether each party has filed the "Certification of Interested Entities or Persons" required by Civil Local Rule 3-15. In addition, each party must restate in the case management statement the contents of its certification by identifying any persons, firms, partnerships, corporations (including parent corporations) or other entities known by the party to have either: (i) a financial interest in the subject matter in controversy or in a party to the proceeding; or (ii) any other kind of interest that could be substantially affected by the outcome of the proceeding.

The parties have filed their Certification of Interested Entities or Persons. Plaintiffs disclosed the following entity: Software Publishers Association, doing business as the Software & Information Industry Association ("SIIA"), is a not-for-profit trade association located in Washington D.C., organized pursuant to Section 501(c)(6) of the Internal Revenue Code to, among other things, represent participants in the SIIA anti-piracy program in preventing infringement of the respective copyrights of said participants. Adobe Systems Incorporated, Autodesk, Inc., and Corel Corporation have authorized the SIIA to assist them in this litigation.

Apart from the SIIA, Forever 21 is not aware of any other Non-party Interested Entities or Persons.

20. Professional Conduct

Whether all attorneys of record for the parties have reviewed the Guidelines for Professional Conduct for the Northern District of California.

The attorneys of record have reviewed the Guidelines for Professional Conduct for the Northern District of California.

21. Other

Such other matters as may facilitate the just, speedy and inexpensive disposition of this matter.

The parties agree to accept service of documents by electronic mail, with service effective

1 the date that the electronic mail is transmitted.

2 Dated: April 23, 2015

DONAHUE FITZGERALD LLP

3
4 By: /s/ Andrew S. MacKay

5 Eric Doney
6 Julie E. Hofer
7 Andrew S. MacKay
8 Attorneys for Plaintiffs
9 ADOBE SYSTEMS INCORPORATED,
10 AUTODESK, INC., and COREL
11 CORPORATION

9 Dated: April 23, 2015

STEPTOE & JOHNSON LLP

11
12 By: /s/ James C. Wald

13 Seong H. Kim
14 James C. Wald
15 David H. Kwasniewski
16 Attorneys for Defendants
17 FOREVER 21, INC. and FOREVER 21
18 RETAIL, INC.

19 Attestation Regarding Signature: This document is being filed electronically under my
20 ECF User ID and Password. Pursuant to Local Rule 5-1(i)(3), I hereby attest that concurrence in
21 this filing of this document has been obtained from the signatories to this document.

22 /s/ Andrew S. MacKay
23 Andrew S. MacKay
24
25
26
27
28

CASE MANAGEMENT ORDER

The above JOINT CASE MANAGEMENT STATEMENT & PROPOSED ORDER is approved as the Case Management Order for this case and all parties shall comply with its provisions. [In addition, the Court makes the further orders stated below:]

IT IS SO ORDERED.

Dated: _____

Hon. William H. Alsup